These principles, followed by the Malayan Courts for more than a quarter of a century were again re-affirmed in 1949 by the Court of Criminal Appeal comprising such experienced judges as Murray-Aynsley C.J., Evans J. and Brown J. in a theft case in *Rajoo* v. *R.*[5] as follows:—

"We say that this direction (of the trial judge) was inadequate because it failed to explain to the jury that if they thought that the appellant had given an explanation which might reasonably be true, even though they were not convinced of its truth, that would mean that the prosecution had, upon the whole of the case, left them in a state of doubt, and so had failed to discharge their burden of proving the accused's guilt."

In the instant case the learned president after holding that the appellant had not convinced him of the truth of his explanation, had failed to further consider whether it might reasonably be true and probable, although not convinced of its truth. It is impossible to say with certainty that he would have convicted the appellant if he had not misdirected himself on the quantum of proof required of an accused person to rebut a prosecution case.

Under the circumstances the appeal is allowed and the conviction and sentence quashed.

Appeal allowed.

Solicitors: *Xavier & Thambiah.*

TENGKU MARIAM BINTE TENGKU SRI WA RAJA & ANOR. v. COMMISSIONER FOR RELIGIOUS AFFAIRS, TRENGGANU & ORS.

[O.C.J. (Wan Suleiman J.) December 29, 1968]
[Kuala Trengganu — Civil Suit No. 11 of 1967]

Muslim Law — Wakaf — Wakaf for benefit of family with ultimate gift to charity — Gifts to charity illusory — Power of revocation reserved by donor — Effect of fetua by Mufti — Administration of Islamic Laws Enactment, 1955, Trengganu, ss. 4, 20(1) and 52(4).

In this case the plaintiffs claimed a declaration *inter alia*, *wakaf* made by one Tengku Chik bin Abdul Rahim is void and of no effect. Under the terms of the *wakaf* property was settled on the family and relatives of the donor with an ultimate gift for religious purposes. The *wakaf* also provided for a few immediate gifts for charity. It was alleged that the donor of the *wakaf* also reserved a power to revoke the *wakaf*.

Held: the *wakaf* was invalid as (a) it was in effect a perpetual family settlement and that the immediate gifts to charity and the ultimate gift to charity were illusory, and (b) the reservation by the donor of a power of revocation was inconsistent with the fundamental idea underlying a *wakaf*.

Semble: Muslim law is the law of the land and it is the duty of the court to propound this law. A *fetua* by the *Mufti* cannot bind the court and the court retains unfettered discretion as to how much of such *fetua* it should accept and the court may decline to be bound by it.

Cases referred to:—

(1) *Guaranty Trust Company of New York* v. *Hannay & Company* [1915] 2 K.B. 536.

(2) *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, 41.

(3) *Ramah binti Ta'at* v. *Laton binti Malim Sutan* (1927), 6 F.M.S.L.R. 128.

(4) *Patimah binti Harris* v. *Haji Ismail bin Tasmin* [1939] M.L.J. 134.

(5) *Abul Fata Mohamed Ishak* v. *Rasamaya Dhur Chowdhri* (1894), L.R. 22 I.A. 76; I.L.R. 22 Cal. 619, P.C.

(6) *Fatuma binti Mohamed bin Salim Bakhshuwen & Anor.* v. *Mohamed bin Salim Bakhshuwen* [1952] A.C. 1.

(7) *Mahomed Ahsanulla Chowdrhy* v. *Amarchand Kundu & Ors.* I.L.R. 17 Cal. 498.

(8) *Abdul Satar & Ors.* v. *Advocate-General of Bombay* A.I.R. 1933 Bom. 87.

CIVIL SUIT.

M. Sivalingam for the plaintiff.

Abu Talib bin Othman (State Legal Adviser, Trengganu) for the 1st defendant.

H.L. Wrigglesworth (*Eugene Phoa* with him) for the 2nd defendant.

Balendram s/o Vallipuram for the 3rd defendant.

Dato' David Marshall for the 4th defendant.

Cur. Adv. Vult.

Wan Suleiman J.: The agreed facts (see agreed bundle pages 37 to 40) in this action are as follows:—

"1. Tengku Chik bin Abdul Rahim (hereinafter referred to as 'Tengku Chik') a Muslim resident in Trengganu was on the 13th day of August 1940 declared to be entitled to a 3/8ths. share free from encumbrances in a large tract of land in the District of Kemaman in the State of Trengganu (hereinafter referred to as 'the Chenderong Concession') by order of the High Court in Kuala Trengganu.

2. (a) On the 22nd day of February, 1941, Tengku Chik made a document purporting to be a *wakaf* (hereinafter referred to as "the said *wakaf*").

(b) The original of the said *wakaf* is in Jawi exhibited at pages 1 and 2 of the agreed bundle with Rumi transliteration at pages 3-6 and English translation at pages 7-10 of the agreed bundle.

(c) The said *wakaf* was registered in the office of the Commissioner for Religious Affairs, Trengganu, as No. 220 in the registration book at pages 68 and 69 thereof.

(d) The said *wakaf* is the *wakaf* referred to *inter alia* in paragraphs 4 and 7 of the statement of claim and paragraphs 3, 5, 7 and 8 of the defence.

3. Tengku Chik died on the 20th June 1956.

4. Tengku Chik left him surviving the following next of kin:—

(1) Che Mek binti Haji Mohamed, the third defendant herein, and

(2) Tengku Seri Wa Raja, his cousin.

5. Che Mek the third defendant was granted and extracted letters of administration to the estate of Tengku Chik by the High Court in Kuala Trengganu.

6. Tengku Seri Wa Raja is the father of the infant plaintiffs.

7. On the 24th day of January, 1957, the 3rd defendant entered into a deed of agreement with Tengku Seri Wa Raja exhibited at page 15 of the agreed bundle (hereinafter referred to as 'the deed of 1957').

8. The *Mufti* of the State of Trengganu appointed under the provisions of the Administration of Islamic Law Enactment, 1955, being Sahibul Fadzillah Mufti Syed Yusoff bin Ali al-Zawawi, J.P., P.J.K., issued a *fetua* relating to the said *wakaf*. This *fetua* is exhibited at page 11 with English translation at page 12 of the agreed bundle, and is hereinafter referred to as 'the said *fetua*'.

9. The said *fetua* was under the provisions of section 21(3) of the Administration of Islamic Law Enactment ordered to be gazetted by His Highness the Regent of Trengganu and was duly gazetted in Government of Trengganu *Gazette* on the 15th day of December, 1966. An English translation of *Gazette* Notification is exhibited at page 13 of the agreed bundle.

10. Tengku Seri Wa Raja died on or about the 26th December 1959.

11. Tengku Seri Wa Raja left him surviving the following next of kin:—

(i) Tengku Maimun, his widow.

(ii) Che Mek binti Haji Talib, his widow.

(iii) Tengku Ngah, his son.

(iv) The two infant plaintiffs herein, his daughters.

12. Letters of administration to the estate of Tengku Seri Wa Raja were granted to but not extracted by his son, Tengku Ngah bin Tengku Seri Wa Raja, in Administration Petition No. 2 of 1960 in the High Court in Kuala Trengganu, and letters of administration were granted to the Official Administrator on 21st April, 1965 and extracted by him on 16th March, 1966.

13. By an instrument dated 21st September, 1960, and for valuable consideration emanating from the 2nd defendant, Tengku Ngah bin Tengku Seri Wa Raja (hereinafter referred to as 'Tengku Ngah') as the purported administrator of the estate of Tengku Seri Wa Raja confirmed the deed of 1957. This instrument is exhibited at page 30 of the agreed bundle and is hereinafter referred to as 'the agreement of 1960').

14. By a document entitled 'Letter of Consent' dated the 15th December, 1960, Tengku Ngah as the purported administrator of and beneficiary of the estate of Tengku Seri Wa Raja accepted the validity of the said *wakaf* unconditionally. This letter of consent is exhibited at page 28 of the agreed bundle.

15. By a document entitled 'Letter of Consent' dated the 15th December, 1960 exhibited at page 29 of the agreed bundle, Tengku Maimun, mother of the infant plaintiffs and for and on their behalf, *inter alia*, accepted unconditionally the validity of the said *wakaf*.

16. (a) Relying on the title of the 1st defendant as indicated by *inter alia*,

(i) The said *wakaf*,

(ii) The deed of 1957,

(iii) The instrument of 1960,

(iv) The *fetua* given on 13th December, 1960,

(v) The 2 letters of consent of the 15th December, 1960,

(vi) The representations of Tengku Ngah and beneficiaries (other than the infant plaintiffs) of the estate of Tengku Seri Wa Raja,

the 2nd defendant entered into an agreement for the lease of the said 3/8ths share in the Chanderong Concession (exhibited at pages 18 to 27 of the agreed bundle and hereinafter referred to as 'the said lease') with the 1st defendant on the 17th January, 1961.

(b) The said lease is referred to, *inter alia*, in paragraph 5 of the statement of claim and paragraph 3 of the defence.

17. In Administration Petition No. 2 of 1960 and on the application and supporting affidavit of Tengku Ngah as administrator, the High Court of Kuala Trengganu on the 9th day of February, 1961, ordered to be deleted from the assets of the estate of Tengku Seri Wa Raja the item numbered '1' referring to a 3/8ths share in the Chanderong Concession. The order of this Honourable Court with annexure is exhibited at pages 31 to 33 of the agreed bundle.

18. The infant plaintiffs are Muslims and are residents of the State of Trengganu.

19. All parties may adduce evidence of additional facts."

The infant plaintiffs, the children of Tengku Seri Wa Raja, claim —

(i) a declaration that the *wakaf* is void;

(ii) an order that the said lease of 7th January, 1961 be set aside; and

(iii) Consequential orders and directions.

At the outset counsel for the plaintiffs withdrew the suit against 1st defendant since the Administration of Islamic Law (Amendment) Enactment 1963 had for all material purposes substituted the fourth defendant, the Majlis Ugama Islam dan Adat Melayu Trengganu for the 1st defendant, the Commissioner for Religious Affairs, Trengganu.

The plaintiffs claim that they are the beneficiaries of Tengku Chik under *Shafei* law, whilst Dato' Marshall for the 4th defendant — and the second and third defendants as well have for all practical purposes adopted the arguments of the 4th defendant — deny this, maintaining that they are beneficiaries only of Tengku Seri Wa Raja and that they have therefore no *locus standi*.

Dato' Marshall contends that the infant plaintiffs are not beneficiaries of the estate of Tengku Chik but are beneficiaries of the estate of their father, Tengku Seri Wa Raja, and are therefore not entitled to a declaratory judgment, whereas the administrator of the estate of Tengku Chik or that of Tengku Seri Wa Raja would be so entitled.

The plaintiffs are, in seeking this declaration on the validity of the *wakaf*, proceeding under Order 25 rule 5 of the Rules of the Supreme Court, 1957. Prayers 2 and 3 are consequential upon such a declaration. This Order 25 rule 5 is identical in terms with the old English Order XXV rule 5.

I assume that when Dato' Marshall says that the plaintiffs have no *locus standi*, he means that they do not have a cause of action. In my opinion, it matters not whether the plaintiffs are the beneficiaries of Tengku Chik (which is denied by defendants) or of Tengku Seri Wa Raja (the

former's cousin and beneficiary), which the defendants admit. What matters is that if the *wakaf* is void, it would remain part of the estate of Tengku Chik, and through him, would become part of the estate of Tengku Seri Wa Raja.

On this point the scope of Order 25 rule 5 is best explained by Pickford L.J. in *Guaranty Trust Company of New York* v. *Hannay & Company* [1] thus:—

> "I think . . . . that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not and at the instance of any party who is interested in the subject matter of the declaration."

It cannot be disputed that the plaintiffs have a real interest in the subject matter.

I need refer to only one other authority out of the welter of authorities which I have been urged to consider by both sides. In *Barnard* v. *National Dock Labour Board*,[2] Denning L.J. (as he then was) said:—

> "I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself."

There is nothing in the present action which would dispose me to close the door to declaratory relief.

I shall next deal with the *wakaf* of 22nd February, 1941 made by Tengku Chik (the English translation is at page 7 of the agreed bundle) who elected for the purpose of the *wakaf* to follow the *Hanafi* School.

What is the effect of the *fetua* issued by the *Mufti* of Trengganu and duly gazetted under section 21(3) of the (Trengganu) Administration of Islamic Law Enactment 1955 on 15th December, 1966? (See English translation of *fetua* on page 13 of agreed bundle).

It would be appropriate to approach the problem by disposing of the question whether Islamic law is foreign or local law.

In the case of *Ramah binti Ta'at* v. *Laton binti Malim Sutan* [3] Acton and Thomas JJ. (Farrer-Manby J. dissenting) held that Mohammedan law is not foreign but local law, that it is the law of the land, and that local law is a matter of which the court must take judicial notice. The court, they held, must propound the law and it is not competent for the court to allow evidence to be led as to what is the local law.

This authority was cited with approval in the Johore case of *Fatimah binti Harris* v. *Haji Ismail bin Jasmin* [4] where Mills J. held that Mohammedan law is a part of the law of Johore.

In a number of States in West Malaysia a curious anomaly has arisen from the fact that this duty to propound the law proved in practice too inconvenient for those who had served their apprenticeship under a different system of laws. In Selangor, for instance, section 41(4) of the Administration of Muslim Law Enactment 1952 provides as follows:—

> "If in any court other than the court of the *Kathi Besar* . . . . any question of Muslim law . . . . falls for decision, and such court requests the opinion of the *Majlis* on such questions, the question shall be referred to the Legal Committee which shall . . . . give its opinion thereon in accordance with the opinion of the majority of its members, and certify such opinion to the requesting court."

It should be noted that the Enactment does not make such opinion binding upon the requesting court, but provides an acceptable mode of obtaining expert evidence, whilst leaving the court free, in theory at least, to propound the law.

I shall next consider the *fetua* issued by the *Mufti* Trengganu which pronounced the *wakaf* valid. Is the *fetua* binding upon the court? Section 4(1) of the Administration of Islamic Law Enactment reads as follows:—

> "Save as expressly provided in this Enactment nothing contained herein shall derogate from or affect the rights and powers of the civil courts."

Then section 25(4) of the same Enactment goes on to say:—

> "Nothing in this Enactment contained shall affect the jurisdiction of any civil court and, in the event of any difference or conflict arising between the decision of a court of the Chief *Kadzi* or a *Kadzi* and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail."

Section 20(1) of the Enactment reads as follows:—

> "Any person, court, civil court, department or institution, may, by letter addressed to the commissioner, request the issue of a *fetua* or ruling on any point of Islamic law or doctrine, or Malay Customary Law."

The wording of the latter sub-section has inclined me to the view that it is doubtful if the legislature had contemplated that a *fetua* should be issued as regards the validity or otherwise of a document such as the *wakaf*, which not only involves the issue of a number of rulings upon various points of Islamic law, but also may, as in the present instance require the consideration of evidence outside the body of the *wakaf* deed. This should not prevent a civil court from splitting the terms of a *wakaf* into components each involving a point of Islamic law or doctrine, and then seeking a series of rulings under the above sub-section upon these points so as to assist it to propound the law, in its application to the facts before it.

In this case, however, it was not a civil court which sought such assistance but a pleader on behalf of his client, Tengku Seri Wa Raja. I refer to exhibit D-2 and the English translation exhibit D-2T. Whilst many of the questions involve points of Islamic law or doctrine which would have been of some assistance in helping the court to decide upon the validity of the *wakaf*, had I sought to obtain assistance under

that sub-section, a number of such questions would be materially different from those posed by the learned pleader.

In any case what is the effect of this *fetua*, duly gazetted under the provisions of section 21 (3) of the Enactment? Any such ruling, (see agreed bundle page 13) duly published on the direction of His Royal Highness the Sultan "shall thereupon be binding on all Muslim residents in the State. . . .".

I have given this matter considerable thought, and am of the view that even if it had been this court which had sought the *fetua*, the court yet retains unfettered discretion as to how much of such *fetua* it should accept, and may decline to be bound by it. I can find nothing in the Enactment which has affected the power of this court to propound Islamic law, which power I now propose to exercise.

I do not feel though I have been urged to do so that I need go into the question of whether and to what extent a State may empower a different tribunal to adjudicate upon matters of Muslim law generally and of *wakafs* in particular under List II — the State List of the Ninth Schedule of our Constitution.

It is contended by the plaintiffs in paragraph 7 of the statement of claim that the *wakaf* is void on account of its being contrary to Muslim law. In paragraph 7A of the statement of claim the plaintiffs contend that:—

"There is no clear and true dedication in perpetuity of the donor's property for Islamic religious and/or charitable purposes".

It has been urged that the *wakaf* is in other words a perpetual family settlement, that the ultimate gift to charity is illusory and too remote and that therefore it is void *ab initio*.

In support of this contention, two decisions of the Privy Council were cited, the first being that of *Abul Fata Mohamed Ishak* v. *Rasamaya Dhur Chowdhri*.[5] The headnote, a reference to which should suffice, reads as follows:—

"An instrument, nominally a *wakafnama*, expressly purporting to make a property *wakaf*, settled it in perpetuity on the family of the dedicators with an ultimate gift for the benefit of the poor, only to take effect on the failure of the descendants of the family. *Held*, that a gift to the poor might be illusory from the smallness of the amount, or from its uncertainty or remoteness; and that the period when the gift was to take effect was so uncertain, and probably so remote, that the gift was illusory. Therefore, according to Mohamedan law, it did not establish a *wakaf*.

. . . . . .

Provision for the dedicator's family, out of the appropriated property, may be consistent with the making of a valid *wakaf*, where the appropriation is for a pious or a charitable purpose. But, as family settlement in perpetuity is contrary to Mahomedan law, and as successions of inalienable life interests are forbidden, such depositions cannot be rendered legal by the mere addition of words that they are made as *wakaf*, or for the benefit of the poor, where no substantial benefit is conferred on the latter."

This decision has been subject to strong criticism by certain leading authorities on Islamic law, none more strongly perhaps than Ameer Ali himself. It would be useful to consider, *in extenso* his searching criticism, replete with reference to authorities, of this decision which appears in pages 344 to 348 of the 4th edition of his work, "Mahommedan Law."

"As a matter of fact, no analogy drawn from English law with regard to trusts and settlements can assist in the comprehension of the Mahommedan law relating to *wakafs*. The Mussulman law relating to trusts or consecrations is founded on the ordinances of the Prophet, and the practice of his companions and early disciples based on those rules. Under the English law a perpetuity is bad. Under the Mussulman law, without any difference, perpetuity is an essential element in the constitution of a *wakaf*. A consecration for one's family and posterity is, in the Mussulman religion and law, a charitable and pious purpose in the strictest sense of the term. But as one's descendants are liable to become extinct at some time or other, the law requires that, in order to ensure perpetuity, the reversion should be to an failing object. Under the recognised *Hanafi* law, such reversion need not be in express terms, for if no other object is mentioned, in whose favour the *wakaf* will take effect upon the extinction of the *wakaf's* descendants, the law itself will supply the omission, and the *wakaf* will be for the poor.

"Having regard to the difference in the standpoints of the English and Mussulman lawyer, it is not surprising that the former, imbued with the doctrine of the English law against perpetuities, should find it difficult to comprehend the Mahommedan law relating to *wakaf* in favour of one's family or the principle upon which it is founded. . . ."

"The judgment of the Calcutta High Court in *Abul Fata Mohamed Ishak* v. *Rasamaya Dhur Chowdhri* has been affirmed by the Judicial Committee of the Privy Council. The authorities in support of family benefactions were brought on this occasion to their Lordships notice. With regard to them they remarked as follows:—

'The opinion of that learned Mahommedan lawyer (referring to the dissenting judge (i.e. Ameer Ali himself) in the case of *Bikani Mia*) is founded, as their Lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated. For instance he quotes a precept of the Prophet Mahomet himself to the effect that 'a pious offering to one's family, to provide against their getting into want, is more pious than giving alms to beggars.' 'The most excellent of *sadakah* is that which a man bestows 'upon his family.' And by way of precedent he refers to the gift of a house in *wakaf* or *sadakah*, of which the revenues were to be received by the descendants of the donor Arkan. His other old authorities are of the same kind.'

As regards precedents, their Lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property except that in the case cited the house seems to have been regarded with special reverence — or of the family, or of the donor."

"It is submitted that those very precedents, which appeared meagre or imperfect to their Lordships form, as has already been attempted to be shown in these pages, the foundation on which the Mahommedan law relating to *wakaf* is based; and it is upon those precedents that Mussulman communities throughout the world have moulded their practice and their religious and social life for centuries.

"Their Lordships observed:— 'As regards precepts which are held up as the fundamental principles of Mahommedan law, their Lordships are not forgetting how far law and religion are mixed up together in the Mahommedan communities; but they asked during the argument how it comes about that by the general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift become legal if only the settlor says that they are made as *wakaf*, in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any. It is true that the donor's absolute interest in the property is curtailed and becomes a life interest, that is to say the *wakafnama* makes him take as *mutwali* or manager. But he is in that position for life; he may spend the income at his will, and no one is to call him to account. That amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed is necessary for the immediate accomplishment of such a design.'

"The keynote to their Lordship's judgment is to be found in this passage; they cannot understand the difference between 'simple gifts', to use their expression and '*wakafs*,' nor were counsel able to explain it to them. One important point of difference may be pointed out. Under the *Hanafi* (*Sunni*) law, when a gift is made the donee takes an absolute interest in the subject of the grant; he has absolute power of disposition over it and can enjoy it in any way he likes and deal with it in any manner he chooses. And accordingly any restriction on, or derogation of, his right by the creation of life interest is held to be invalid. In a gift or *hiba*, the donee is a human being; in *wakaf* (for whatever purpose made so long as it is not immoral), the donee is the Almighty God. In *hiba*, the object is to pass the property from one human being to another; in a *wakaf*, the object is to keep the property in the custody of the Almighty for the benefit of mankind; and, therefore, if the original purpose named at the constitution of the *wakaf* fails, the benefit is applied to other purposes of a like nature. If a *wakaf* is for specific individuals and they come to an end, it is applied to the relief of the poor and needy. Again, in the case of a *hiba* the dominion over the subject passes from one human being to another; in the case of a *wakaf* the right of property is absolutely extinguished. If the grantor or appropriator were to remain in possession, it would be only as a trustee. He may be turned out any moment for breach of the conditions of the consecration. The beneficiaries have no right in the property; they are only entitled to the benefit of the trust to the extent specified in the *wakaf*.

" 'Their Lordships' the judgment continues 'have endeavoured to the best of their ability to ascertain and apply the Mahommedan law, as known and administered in India, but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law and practice of *wakaf*, as the learned judge says they have. But it would be doing wrong to the great law-giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial, in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulation of income and further accessions of family property; which carefully protect so-called managers from being called to account; which seek to give to the donors and their family their enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words."

"In making these remarks their Lordships, it is submitted, did not sufficiently keep in view the principle underlying the Mahommedan doctrine of family benefactions that a provision for one's family and descendants is an act of piety, more pious than giving to strangers. And it is very probably owing to this circumstance that the law enunciated in the works of Mussulman writers seemed to their Lordships an 'extravagant application of abstract precepts taken from the mouth of the Prophet.'

"The above quoted passages give rise to the following considerations, which are submitted without in any way impugning the authority which must always attach to the utterances of the Judicial Committee:—

'Are Courts of Justice competent to inquire into the origin of, or all reason for, any law recognised and accepted among any community subject to British rule the enjoyment of which has been guaranteed to them as well by statute as by Royal Proclamation? Are they not bound to administer the law as they find it? Is it not their duty to ascertain what the law is as received, recognised and acted upon by the general body of the community?

'And if they are entitled to consider what was in the mind of the Law-given, are they competent to rely upon their own *a priori* reasoning and preconceived notions without any regard to his recorded sayings and acts as understood by his followers all over the world?'

"In the cases to which references have been made in this chapter, the courts had to find what the developed Mahommedan law of *wakaf* was as accepted by the generality of Mussulman lawyers and jurists, and to administer the same, although it might have appeared to them that in some respects it was inconsistent with the law on the subject of *gift*. It is respectfully submitted it is not competent to Courts of Justice to refuse to administer the law as they find it until it is ascertained to be in direct contravention of the statutory enactments of the State.

"If the enunciation means that a *wakaf* purely in favour of one's descendants is not valid then it must be respectfully submitted that the views expressed by their Lordships are opposed to the Mahommedan law and the general consensus of Mahommedan nations."

However in the case of *Fatuma binti Mohamed bin Salim Bakhshuwen & Anor.* v. *Mohamed bin Salim Bakshuwen*,[6] the Privy Council again considered *Abul Fata's* case, took note of the criticism which had been levelled at the latter case and confirmed what it had decided more than half a century earlier. In delivering the judgment of their Lordships, Lord Simonds said:—

"In the present appeal counsel has challenged the correctness of the judgment under review on a number of grounds. He has boldly urged that the decision in *Abul Fata's* case should itself be reviewed in the light of material which, as he says, was not brought, or not adequately brought, to the knowledge of the Board. He has further contended that, whatever binding force the decision might (but for supervening legislation to which reference will be made) be regarded as having in the courts of India, in East Africa the courts must be guided by, and have regard to the general principles of the laws of Islam according to which a *wakaf* for the benefit of the donor's family is valid. And finally he has contended that in any event, the present case is distinguishable from *Abul Fata's* case in that here the parties are of the *Shafi* sect, and the donor had divested himself of all beneficial interest in the property. With the last

contention their Lordships can deal in a few words. It is plain from the judgments of the courts below and from the notes of the arguments which appear on the record that the case proceeded on the footing that no relevant distinction on this point could be made between *Shafi* and *Hanafi* law. This might not have been fatal, if it had been shown to their Lordships' satisfaction that there was such a distinction which had for some reason been overlooked. But this was not done and, as their Lordships think, could not have deen done. . . .

"Their Lordships turned to the first ground of appeal. With the assistance of counsel they have carefully considered not only the so-called leading case (*Abul Fata's* case), but numerous cases decided before and after that date in the courts of India and the Privy Council. In particular, they have examined what truly might be called the leading case in this branch of the law, *Bikani Mia* v. *Shuk Lay Poddar*, in which Ameer Ali J. in a long dissenting judgment brought all the resources of his great learning to bear in support of the validity of such a *wakaf* as that now under consideration. There is no doubt that that judge and Mahommedan lawyers in general who thought with him were convinced that the judgment was wrong. But it appears to their Lordships that, whatever views might have been entertained in the 18th and earlier centuries, by the end of the 19th the trend of judicial opinion was firmly set in favour of the view that such *wakafs* were invalid, and that the conclusions to which the High Court of Calcutta and this Board came were inevitable. And in many cases after *Abul Fata's* case the same conclusion was reached. As Lord Robertson said in *Muji Bunnissa* v. *Abdul Rahim*:— 'It will be so' (i.e. the *wakaf* will be valid) 'if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family.' If the result was not acceptable to Muslim sentiment, it was to the legislature that recourse must be had. . . .

"Their Lordships are asked, nevertheless, to say that *Abul Fata's* case was wrongly decided, and the well known authority of *Read* v. *Bishop of Lincoln* ([1892] A.C. 644) is invoked to justify a re-examination and restatement of the principles of Mahommedan law. This course they cannot adopt. It may well be that, since the decision in *Abul Fata's* case was given, Ameer Ali J. and other writers have elaborated the views so fully propounded in *Bikani Mia's* case, but it is impossible to suppose that what has been written since that date or, having been written before it, has now for the first time been brought to the notice of the Board could have achieved what Ameer Ali J.'s vigorous dissent failed to do. Nor does it avail the appellants that in parts of the world outside India where Mahommedan law obtains, whether in Africa or in Asia such *wakafs* as these are considered to be valid. Their Lordships are not satisfied of the general truth of this proposition; but even if it were so, that would not be such fresh light as would justify the Board in reversing its previous decision."

The present *wakaf* may be conveniently divided into two parts propertywise. The first comprises a house and land at Kampong Padang, Kuala Trengganu (Grant No. 921) and the other part a piece of land (C.T. No. 697, Lot No. 511, Mukim Bandar) and the Chanderong Concession, Kemaman.

As in the case of *Abul Fata*, the terms of the *wakaf* in respect of both parts, expressly purport to make the property *wakaf* and appear to have the effect of settling both parts of the donor's estate on his family and relatives in perpetuity with in this case an ultimate gift for religious purposes. (In *Abul Fata's* case it was a gift for the benefit of the poor).

The only material difference is that in the instant case there exist certain other conditions. I refer to conditions 2, 3, 4, 5 and 6, the English translation of which is at pages 9 and 10 of the agreed bundle.

The payment of pilgrimage fees for persons to perform three pilgrimages (*Blanja Upah Haji*) involved no doubt the payment out of a fairly large sum but is however non-recurrent.

Conditions 3, 4 and 5 are recurrent items of charity with a religious flavour, condition 3 not specifying the amount to be expended, but condition 4 enjoining the spending of not less than $360 *per* annum and condition 5, $720 *per* annum.

On the face of it these conditions of a charitable nature may appear to be of a substantial nature in comparison with the value of the property at the time when the *wakaf* was made, i.e. in 1941. However, condition 6 indicates that the donor clearly envisaged what any reasonable person would be expected to envisage, namely, that the concession has enormous potential value. The evidence of the defendants' witness, Mr. H.G. Wong shows that the concession even after making allowances for the vague manner in which the original grant defines its boundaries, is not less than 65,000 acres in extent. Tengku Chik's share being three-eights of that area would be about 24,000 acres in area. Wong's evidence as regards what has already been expended by his company i.e. about $750,000 on preliminary development works, such as road building, prospecting for various minerals and the preparation of a palm oil nursery is an indication of the potential value which must have been just as obvious in 1941 as it was obvious in 1961 when the Commissioner for Religious Affairs, Trengganu, entered into a lease in his capacity as *wakif* of the concession with Mr. Wong's company.

It is this realisation of potential value which doubtlessly caused the donor to insert condition 6 of the *wakaf* wherein, I should say with great foresight, the donor envisaged a time when a mere 6% of the income from the land would meet all expenditure of a religio-charitable nature and yet leave a balance for other religio-charitable purposes.

As to what amounts to a substantial gift to the poor, I would refer to the words of Lord Hobhouse in *Abul Fata's* case:—

"A gift may be illusory whether from its small amount or from its uncertainty and remoteness. If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognised as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family."

The provision for immediate gifts in the instant *wakaf* may not on a casual examination

be so obviously illusory. However we are dealing with a *wakaf* of property obviously of great potential value created at a time when development had hardly commenced so that what may appear to be substantial gifts for religio-charitable objects at the time of the making of such gift would within a few years of the making of the *wakaf* amount only to a small proportion of an ever increasing income which development would ensure.

In yet another Privy Council decision, *Mohamed Ahsanulla Chowdhry* v. *Amarchand Kundu & Ors.*[7] which preceded *Abul Fata's* case, the terms of the *wakaf* being somewhat similar to the present one, their Lordships were not called upon to decide whether a gift of property to charitable uses which was only to take effect after the failure of the grantor's descendants was an illusory gift. What they had to consider was whether the property in question was in substance given to charitable uses.

The deed purported to dedicate certain properties for defraying the expenses of a brick built *musjid* and two *madrasahs* and a lodging house belonging to the appropriator, and it provided that the grantor's three sons should be appointed *mutawalli* in gradation of rank; that the *mutawalli* after defraying the expenses of the *mosaref* and the necessary collections of the *zemindari*, should take from the residue his monthly allowance, pay over the allowance due to the *naib-mutawalli*, *naib-ul-mainab* and his daughters as specified in the schedule, and continue to perform the stated religious work according to custom and keep his eye to the legitimate objects of the *mosaref;* that the surplus that might be left after meeting the above mentioned expenses should be added to the *wakaf* estate; that the persons getting monthly allowances should have no power to assign or charge them in any manner; and that the *mutawalli* should have the power to increase or decrease the allowances of the members of the family as well as their own salaries.

Their Lordships remarked:—

"If indeed it was shown that the customary uses were of such magnitude as to exhaust the income or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor. But the court in the execution proceedings considered that the charitable outlays which he contemplated were of small amount compared with the property. The subordinate judge in this suit does not deal with the matter. The High Court says that the plaintiff has carefully withheld evidence as to value, and believes it was much more than he represented. For all that appears there is no reason to suppose that the charitable use would absorb more that a devout and wealthy gentleman might find it becoming to spend in that way."

The conclusion at which their Lordships arrived was that the deed in question did not constitute a valid *wakaf* and that the property had not been in substance given to charitable uses.

On this ground therefore I cannot but consider myself bound by the decisions referred to above and must therefore declare the *wakaf* void.

A second ground on which the validity of the *wakaf* is impeached appears at paragraph 7(C) of the statement of claim. The plaintiffs contend therein that the reservation in the *wakaf* by the donor of a power of revocation is contrary to Muslim law.

My attention was drawn to the Indian decision of *Abdul Satar & Ors.* v. *Advocate-General of Bombay.*[8] The relevant part of the headnote reads as follows:—

"The reservation of a power of revocation in a deed of *wakaf* is inconsistent with the fundamental idea underlying a *wakaf*, that fundamental idea being that the property is treated as vested, not in trustees, but in Almighty God, and therefore a power of revocation in favour of the settlor contained in a deed of *wakaf* renders the deed void and it is immaterial that where there are two settlors the power of revocation is only in favour of one of them when both concur in giving such power."

In respect of plaintiffs' contention contained in paragraph 7(C) of the statement of claim, I also hold, in view of the decision I have adverted to, that the *wakaf* is void.

The other grounds which plaintiffs contend make the *wakaf* void are contained in paragraph 7(B), (D) and (E) respectively of the statement of claim.

In connection with paragraph 7(B) I was referred to *Mulla's* Principles of Mahommedan Law, 15th edition, page 169 paragraph 191 where it is stated that it is essential to the validity of a *wakaf* that the appropriation should not be made to depend on contingencies.

Condition 6 of the present *wakaf* is cited as the source of uncertainty. However even a cursory examination will show that the conditions merely indicate the alternative manner by which payments for the disbursements under conditions 2, 3, 4 and 5 may be made. The appropriation, i.e. taking effect of the dedication does not depend on condition 6. The cases cited in the above mentioned paragraph 191 fortifies me in my view.

The numerous uncertainties referred to in paragraph 7(E), apart from the uncertainties said to be contained in condition 6 were not specified by counsel for the plaintiffs in his submission. My attention was drawn to paragraph 179 at page 159 of *Mulla* which reads:—

"The object of a *wakaf* must be indicated with reasonable certainty; if they are not, the *wakaf* will be void for uncertainty."

Whatever else may be said of the present *wakaf*, it is clear to me that there is no uncertainty regarding its object.

Lastly I shall deal with paragraph 7(D) of the statement of claim wherein the plaintiffs

contend that provisions in the *wakaf* as to the discharge of the donor's outstanding debts are contrary to Muslim law and therefore make the *wakaf* void. It was contended that the *wakaf* must specify that that should be paid out of the income. In support of this proposition no authority was cited nor am I able to find any authority to support it.

In so far as sub-paragraphs (B), (D) and (E) of paragraph 7 are concerned I am unable to agree with the plaintiffs.

However in view of my finding in respect of sub-paragraph 7(A), and 7(C), I give judgment for the plaintiffs and hold that the *wakaf* is void. I also order that the lease of the 7th January 1961 be set aside and award the costs of this action to the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Lim Cheng Ean & Co.; Chung & Huang; Maxwell, Kenion, Cowdy & Jones; Wrigglesworth & Co.*

SINO-BRITISH (M) LTD. v. NANYANG DEVELOPMENT CO. (M) LTD. & ANOR.

[O.C.J. (Abdul Aziz J.) January 22, 1969]
[K.L. — Civil Suit No. 422 of 1966]

Principal and Agent — Agent untruly warranting authority — Principal not ratifying acts of agent — Liability of agent.

Costs — Successful joint defendant denied.

Contracts (Malay States) Ordinance, 1956, ss. 186, 188.

The plaintiff brought this action against the first defendant and its agent, the second defendant claiming for value of work done by the plaintiff for the first defendant at the request of the second defendant. The plaintiff's evidence was that the second defendant represented himself as the agent of the first defendant and ordered the works to be done which the plaintiff carried out in good faith.

Both defendants denied liability. The second defendant's evidence was that at the material time he was the director and manager of a company called K.L. Properties Ltd., which owned the properties on which the works were to be carried out. He denied acting as the agent of the first defendant and having authority to contract on its behalf.

Held: on the evidence the second defendant untruly represented himself to be the authorised agent of the first defendant and not K.L. Properties Ltd. for it was highly unlikely that the plaintiff would have demanded payment from the first defendant if the first defendant had not been represented as the principal. In such a case, if the representer's acts are not ratified, the representer is personally liable to make good the loss or damage suffered by the representee. In this case since the first defendant had not ratified the second defendant's acts the second defendant was liable for the value of the work done.

CIVIL SUIT.

N.A. Marjoribanks for the plaintiff.

Chooi Mun Sou for the defendants.

Cur. Adv. Vult.

Abdul Aziz J.: According to the pleadings, the plaintiff's claim is that the defendants jointly ordered and are, therefore, jointly liable for the cost of the work done by the plaintiff. The defendants (note the plural) merely denied liability. Defendant No. 2 further denied having had any dealings whatsoever with the plaintiff. The evidence disclosed that the plaintiff's action was against the Nanyang Development Co. (M) Ltd. as principal (defendant No. 1) and Cheah Yap Thin as agent (defendant No. 2) for value of work done by the plaintiff for the defendant (1) at the request of the defendant (2). The defence is that the work was done for another principal, i.e. K.L. Properties Ltd. No objections were taken to the pleadings and no steps were taken to amend the pleadings.

The plaintiff's evidence, which has in no way been discredited, is that the second defendant representing himself as the agent of the defendant (1) ordered parquet flooring to be laid in 72 flats at Jalan Bukit Bintang. Acting in good faith, the plaintiff carried out the work and then requested for progress payments and, subsequently, for the final payment. Several reminders were sent to the defendant (1) to the address of the first defendant, which was also the address of the second defendant. There was no response either from the defendant No. 1 or the defendant No. 2 to these demands. The letter purported to be issued by the defendant No. 1 denying liability — which was disputed by the plaintiff — was rejected as it was unproved.

Defendant No. 2's evidence is that he had no authority to contract on behalf of defendant No. 1. At the material time, he was not the director of the firm and not an agent of the defendant (1) and the defendant (1) was in no way connected with the construction of the flats. On the material date, he was the manager and director of the K.L. Properties Ltd. They were the developers and the owners of the flats in question. He knew that parquet flooring was laid in the flats, but he did not know who did the job and whether it had been paid for or not. He did not order anything on his own behalf. K.L. Properties Ltd. should rightly be sued for the amount. Having regard to the size and the value of the work done, it seems to me farfetched that defendant No. 2, who was directly concerned with the construction of the flats, was not aware who did the work and whether the work was paid for or not. Also, it is highly unlikely plaintiff would have demanded payment from defendant No. 1 if defendant No. 1 had not been represented as the principal. That representation by defendant